

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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EILEEN SYMS, Individually and as  
Executrix of the Estate of John Syms,  
THE SOMERSET GROUP, INC.,  
UNITOOL CORPORATION,  
LEW-PORT CONSTRUCTION CORPORATION,  
C&S MACHINERY CORPORATION,  
SYMS EQUIPMENT RENTAL CORPORATION, and  
LEW-PORT ELECTRICAL CORPORATION,

Plaintiffs,

v.

OLIN CORPORATION,

Defendant.

ORDER  
04-CV-316

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EILEEN SYMS, Individually and as  
Executrix of the Estate of John Syms,  
THE SOMERSET GROUP, INC.,  
UNITOOL CORPORATION,  
LEW-PORT CONSTRUCTION CORPORATION,  
C&S MACHINERY CORPORATION,  
SYMS EQUIPMENT RENTAL CORPORATION, and  
LEW-PORT ELECTRICAL CORPORATION,

Plaintiffs,

v.

OLIN CORPORATION,  
UNITED STATES DEPARTMENT OF DEFENSE,  
DONALD RUMSFELD, in his official capacity as  
Secretary of Defense,  
UNITED STATES DEPARTMENT OF THE ARMY,  
THOMAS E. WHITE, in his official capacity as  
Secretary of the Army,  
UNITED STATES DEPARTMENT OF THE AIR FORCE,  
DR. JAMES G. ROCHE, in his official capacity as  
Secretary of the Air Force,  
UNITED STATES NUCLEAR REGULATORY COMMISSION,  
RICHARD A. MESERVE, in his official capacity as  
Chairman of the United States Nuclear Regulatory  
Commission, and  
THE UNITED STATES OF AMERICA,

Defendants.

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ORDER  
00-CV-732

Case No. 04-CV-316A was removed to this Court from New York State Supreme Court by the defendant Olin Corporation on April 22, 2004. On May 28, 2004, defendant Olin filed a motion to dismiss. The case was referred to Magistrate Judge Leslie G. Foschio, pursuant to 28 U.S.C. § 636(b)(1), on June 2, 2004. On February 7, 2006, Case No. 04-CV-316A was consolidated with Case No. 00-CV-732A. On March 24, 2006, Magistrate Judge Foschio filed a Report and Recommendation, recommending, *inter alia*, that defendant Olin's motion to dismiss should be granted insofar it seeks to dismiss all claims brought against it under New York law.

Plaintiffs filed objections to the Report and Recommendation and defendants filed a response thereto. Oral argument on the objections was held on May 24 and June 26, 2006. An evidentiary hearing was held on August 2 and 3, 2006.

Pursuant to 28 U.S.C. § 636(b)(1), this Court must make a de novo determination of those portions of the Report and Recommendation to which objections have been made. Upon a de novo review of the Report and Recommendation, and after reviewing the submissions and hearing argument from the parties, the Court adopts the proposed findings of the Report and Recommendation.

The Court notes that plaintiffs have raised two arguments in their objections that they did not raise before the Magistrate Judge: (1) that § 113(h) of the Comprehensive Environment Response, Compensation, and Liability Act ("CERCLA") does not divest the Court of jurisdiction to grant injunctive relief

because Case No. 04-CV-316A was removed here on the basis of diversity jurisdiction, not federal question jurisdiction; and (2) that § 122(e)(6) of CERCLA does not preclude all types of injunctive relief, such as ordering Olin to conduct a “removal” action, as opposed to a “remedial” action. Because these arguments were not raised before the Magistrate Judge, but could have been, the Court shall not consider them. See Paterson-Leitch Co. v. Massachusetts Mun. Wholesale Elec. Co., 840 F.2d 985, 990 (1<sup>st</sup> Cir. 1988); Tenen v. Winter, 15 F. Supp. 2d 270, 272 (W.D.N.Y. 1998).

Accordingly, for the reasons set forth in Magistrate Judge Foschio's Report and Recommendation and herein, the Court grants defendant Olin's motion to dismiss all the claims asserted against it under New York law. These cases are referred back to Magistrate Judge Foschio for further proceedings.

IT IS SO ORDERED.

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*/s/ Richard J. Arcara*

HONORABLE RICHARD J. ARCARA  
CHIEF JUDGE  
UNITED STATES DISTRICT COURT

DATED: September 15 , 2006